NO. 48946-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

Respondent,

vs.

JOSEPH GUENTHER,

Appellant.

BRIEF OF RESPONDENT

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B. Whether the Trial Court properly denied a defense motion for mistrial when it provided a curative instruction following an arguably improper question related to witness credibility?

C. Whether defense counsel provided effective assistance of counsel during the closing argument phase of the trial?

D. Whether the Trial Court properly imposed legal financial obligations?

E. Whether this Court should impose appellate costs due to Defendant's alleged indigency?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On December 22, 2015, the State charged the Defendant in Jefferson County Superior Court with one count of trafficking stolen property in the first degree and one count of criminal trespass in the

second degree. CP 1 -2. Just prior to the start of trial the State moved to dismiss Count II, the criminal trespass charge. RP 3.

The matter proceeded to trial and a jury returned a verdict of guilty with respect Count I, trafficking in stolen property in the first degree. CP 109. The Trial Court sentenced Defendant to the mid-range of a standard range sentence - nine months (with work release authorized if the Defendant qualified for it). CP 122 – 129. In addition, the Trial Court imposed $1,400.00 in legal financial obligations reflecting a DNA fee of $100.00, a Victim Assessment fee of $500.00, a criminal filing fee of $200 and fees for court appointed counsel in the amount of $600.00. *Id.*

B. FACTS

December 21, 2015, was supposed to be a day off for Jefferson County Sheriff's Deputy Gordon Tamura. RP 118 – 119. That morning around 10:00 a.m. Deputy Tamura headed into town to run some errands. *Id.* at 119. On his way in he noticed two vehicles parked in an area that doesn't usually have vehicles parked there. *Id.* at 119 – 120. On his return he saw the vehicles leaving. *Id.* at 120. Curious, he decided to take a closer look as he lives in this area of Jefferson County. *Id.* at 119 – 121. When he walked back into the woods he noticed what appeared to be fresh cut marks on trees. *Id.*

Deputy Tamura saw evidence that whomever was cutting the wood was in the process of "blocking" it out. *Id.* That is, "the sections that were

cut up or at least in the process of being processed was several feet in length, which is more typical with furniture or, uh, musical instruments." *Id.* at 122. Deputy Tamura further testified the length of the blocks was "definitely larger than you would cut for firewood." *Id.*

Suspecting a maple theft, Deputy Tamura went home and looked up the parcel to see who owned the property. *Id.* at 123. He discovered the property belonged to a family trust from the Seattle area. *Id.*

A little later Deputy Tamura stepped out in his backyard and heard a saw start up in the general area of where he saw the tree being blocked. *Id.* Based on his history of dealing with maple theft and concerned about whether other members of the Sheriff's Office were available, Deputy Tamura grabbed his identification, badge, duty weapon, and drove to the site in his patrol car. *Id.*

Deputy Tamura made contact with the Defendant, Joseph Guenther, and asked him if he had permission to be on the property and had a permit to harvest trees. *Id.* at 124. On questioning, Mr. Guenther was not able to identify the owner of the property, indicated he did not know he had to have a permit, and appeared very nervous. *Id.* at 125 – 126. Deputy Tamura also testified Mr. Guenther told him a friend, whose name Mr. Guenther was not able to provide, said it was okay to fell the tree in question. *Id.* at 126. At that point Deputy Tamura detained Mr. Guenther. *Id.*

Peter Smith helped fell the maple tree in question. *Id.* at 107. He testified Mr. Guenther had called him earlier in the day and asked if Mr. Smith would come and give him a hand cutting firewood. *Id.* When Mr. Smith arrived at the site Mr. Guenther advised him that the tree might be "figured" meaning that it might have a wave pattern in the grain that makes it very pretty and is used for instruments. *Id.* at 108.

Mr. Smith testified that figured maple is more valuable than unfigured maple though such maple is very rare – described as one in a million. *Id.* at 109. He also testified that Mr. Guenther told him that he, Guenther, had permission to be on the property. *Id.*

Mr. Smith testified that Mr. Guenther said, before the tree was cut down, that he wanted to sell it as music wood if it was figured. *Id.* at 110.

Sgt. Mark Apeland of the Jefferson County Sheriff's Office testified he had investigated a number of wood/maple thefts and illegal logging in his 20 years of law enforcement experience. *Id.* at 132. Based on his experience Sgt. Apeland testified that wood, particularly Western bigleaf maple, is used for furniture and musical instruments. *Id.* at 133. He also testified that the wood is cut in at least 24" lengths at a minimum. *Id.* at 134. A defense expert later testified the tree in question was a bigleaf maple. Id. at 179.

Sgt. Apeland also made contact with Mr. Guenther. *Id.* at 137. Mr. Guenther told him the land in question belonged to a man in

California but he did not have a name or contact number for this individual. *Id.* Then Mr. Guenther advised that he was just there to help Mr. Smith. *Id.*

Sgt. Apeland testified Mr. Guenther once again changed his story and told Sgt. Apeland that "he didn't specifically have permission to be there, but some other guy named John did, but he couldn't provide any information about John." *Id.*

Sgt. Apeland placed Mr. Guenther under arrest. *Id.* at 147. Sgt. Apeland testified Mr. Guenther acknowledged he did not have permission to be present on the land in question and that he was going to try to cut some of the wood and sell it to Faith Farm. *Id.* Sgt. Apeland further testified that Faith Farm is a mill that cuts maple blocks down into billets for sale for musical instruments. *Id.* He also testified Mr. Guenther's explanation was consistent with the cuts in the maple tree Sgt. Apeland observed. *Id.*

Sgt. Apeland testified that the land in question belongs to a trust from Shoreline. *Id.* at 148. Finally on re-direct, Sgt. Apeland testified "[h]e [Mr. Guenther] was going to try to sell the figured portion to the Faith Farm and cut the rest into firewood." *Id.* at 153.

Wilfred Epping testified that he is the trustee for the trust/land in question. *Id.* at 189. He further testified that he had not given anyone

permission to harvest timber off trust property for December 2015, though he had in May of 2015. *Id.* at 190.

Facts Related to Closing Argument.

> In his closing argument the Deputy Prosecutor stated:
>
> He makes his way over to that property and Mr. Guenther tells him, um, which tree he wants him to fell. Mr. Guenther then fells the tree. Now recall, this isn't just any tree. This is a -- okay, good. This is a bigleaf maple in a sta -- in a forested parcel of land with that popcorn formation pattern, that you heard Mr. Cecil talk about, at the base. That's the tree that he wanted felled. Not any tree. That one, that had that popcorn pattern. Which, as you heard Mr. Cecil testify is often indicative of a burled or figured wood pattern and that's what typically has value to, as we found out, the guitar industry, as it's prized for the patterns that are typically used on ***guitars***.
>
> So, after he felled the tree, he left to get a new chain for his chainsaw to help cut up the tree. Now, you'll recall that Mr. Smith said that the defendant had wanted to sell the figured part, or, if there was a figured part to Faith Farms. Faith Farms, as you heard Sergeant Apeland testify, is a, is an organization or a business down near Quilcene that buys, um, figured maple for resale to ***guitar*** manufacturers, or other musical instrument makers.

Emphasis added for convenience. *Id.* at 228 – 229.

Defense Counsel did not lodge an objection to the use of the word "guitar" during this portion of the State's closing argument. *Id.*

Facts Related to Questions Regarding Witness Credibility and Mistrial

The Deputy Prosecutor trying the case asked Sgt. Apeland if Mr. Smith appeared forthright. *Id.* at 139. Sgt. Apeland replied, "[h]e did."

Id. Defense counsel objected. *Id.* The Trial Court sustained the objection and said, "the jury will ignore that last question and answer. *Id.*

A few minutes later the Deputy Prosecutor asked the following question: "Was there anything about Mr. Smith's behavior at that time that indicated deception?" *Id.* Defense counsel once again objected (this time before the question could be answered) and requested the jury be excused. *Id.*

> Defense counsel moved for a mistrial. *Id.* at 141. The Trial Court denied the motion and provided a curative instruction. *Id.* at 142, 146. The Court also sustained the objection to the question. *Id.* at 143. For its curative instruction the Trial Court advised the jury: Prior to the jury going out there was an objection by Mr. Roberts for the defense that it was improper to, or, there was an objection by Mr. Roberts for the defense concerning questions of the officer relating to Mr. Smith's, whether, whether he was straightforward or forthright, or whether he appeared to be deceptive. Those questions were not proper questions to ask of this officer and, um, any response by the officer would not be proper.
>
> So, the objection is sustained and the jury will ignore, um, will ignore the testimony of the officer pertaining to whether, whether or not Mr. Smith was straightforward, forthright, or deceptive or not. And the answers are stricken from the record in that regard.

Id. at 146.

Facts Related to Defendant's Ability to Pay Legal Financial Obligations

The Trial Court advised Mr. Guenther of his total legal financial obligations (hereinafter "LFOs") of $1,400.00. *Id.* at 267. The Trial Court asked if Mr. Guenther would be able to work and if he could pay off the obligations over the next three or four years." *Id.*

At four years the repayment amount would be $29.17/month for the principal. Mr. Guenther said he would be able to pay off the LFOs at about $50.00/month. *Id.* The Trial Court asked: "You feel confident you can do that?" *Id.* Mr. Guenther responded in the affirmative. *Id.*

III. ARGUMENT

A. The Deputy Prosecutor did not engage in prosecutorial misconduct.

1. *De minimis* misstatements of the facts in closing argument do not constitute prosecutorial misconduct.

To prove Mr. Guenther engaged in trafficking in stolen property in the first degree, the State needed to prove the following elements per RCW 9A.82.050 and WPIC 77.31:

> (1) That on or about (date), the defendant knowingly
>
> (a) [initiated] [organized] [planned] [financed] [directed] [managed] [or] [supervised] the theft of property for sale to others, [or]
>
> (b) trafficked in stolen property knowing the property was stolen; and
>
> (2) That any of these acts occurred in the State of Washington.

See also CP 29.

The core issue from the State's perspective is whether the wood in question was being trafficked or was going to be trafficked – not what the wood was going to be used for. Defendant may see the core issue as

whether the wood was going to be used for guitars (which have value) or for firewood (which may have been for personal use).

It is for this latter reason Defendant most likely takes issue with the Deputy Prosecutor's use of the word "guitar" in closing argument, asserting that there were no such facts before the jury. Defendant's Brief (hereinafter "DB") at 8.

Defendant correctly acknowledges "[a] defendant claiming prosecutorial misconduct bears the burden of demonstrating that the conduct was improper and that it prejudiced her defense. State v. Harvey, 34 Wn. App. 737, 740, 664 P.2d 1281 (1983), review denied, 100 Wn.2d 1008 (1983). " See also, *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747, (1994)

The State acknowledges the Deputy Prosecutor incorrectly referenced guitars. However, as stated previously, Sgt. Apeland testified Mr. Guenther acknowledged he was going to try to cut some of the wood and sell it to Faith Farm. Sgt. Apeland also testified that Faith Farm is a mill that cuts maple blocks down into billets for sale for musical instruments. Sgt. Apeland also noted Mr. Guenther's explanation of events was consistent with the cuts in the maple tree Sgt. Apeland observed.

Based on the testimony at trial, the Deputy Prosecutor could have used the phrase "musical instrument," "wooden musical instrument," or

even arguably, "perhaps a wooden instrument such as a guitar, violin, cello, or so on."

The State fails to see how this brief misstatement, no doubt accidental, was improper, shifted the State's burden, or in any other way prejudiced Defendant's right to a fair trial. Defendant's apparent assertion that calling the musical instrument a guitar somehow made it easier for the State to prove trafficking in stolen property makes little sense.

Defendant has failed to meet his burden in establishing the State's conduct was improper and prejudiced his defense.

2. An arguably improper question for which the Trial Court fashioned a curative instruction does not justify a finding of prosecutorial misconduct requiring any further remedy.

The State concedes the Deputy Prosecutor should not have asked the Officer if Mr. Smith was forthright. However, defense counsel objected, the objection was sustained, and the jury was instructed to disregard the answer. The State also concedes the Deputy Prosecutor should not have asked Sgt. Apeland if anything about Mr. Smith's behavior at the time indicated deception. Once again, defense counsel objected, the objection was sustained and the Trial Court provided a curative instruction. Furthermore, with the second question, the objection came before an answer could be provided.

Jurys are presumed to follow instructions given them. *Russell* at

84. Just as in *Russell*, the Trial Court struck the two questions from the record, instructed the jury to disregard the questions and the answers, the second one of which had gone unanswered because of the timely objection.

In *State v. Warren,* 165 Wn. 2d 17, 26, 195 P.3rd 940 (2008), the Court determined once again, that "to prevail on a claim of prosecutorial misconduct, a defendant must show first the prosecutor's comments were improper and second that the comments were prejudicial." The Court also determined that such an error could be cured. *Id.* at 28.

In *Warren* the Deputy Prosecutor made a much more serious error in closing argument in that it "undermined the presumption of innocence. *Id.* at 26. The error was repeated three times. *Id.* at 24. In addressing the issue the Court stated:

> Had the trial judge not intervened to give an appropriate and effective curative instruction, we would not hesitate to conclude that such a remarkable misstatement of the law by a prosecutor constitutes reversible error. However, reviewing the argument in context, because Judge Hayden interrupted the prosecutor's argument to give a correct and thorough curative instruction, we find that any error was cured. We presume the jury was able to follow the court's instruction. (some improper prosecutorial remarks may touch upon constitutional rights but are still curable by a proper instruction).

Id. at 28 [internal citations omitted].

Here, the questions related to witness credibility were improper. Nonetheless, as in *Warren*, the Trial Court properly "cured" the defect by

providing an appropriate curative instruction. As such, any potential prejudice to Defendant's rights to a fair trial were mitigated.

B. The Trial Court did not abuse its discretion when it denied a defense motion for mistrial after providing a curative instruction following an arguably improper question related to witness credibility.

A trial court's decision to deny a motion for mistrial is reviewed for an abuse of discretion. *State v. Garcia*, 177 Wn. App. 769, 776, 313 P.3rd 422 (2013). "[A]buse of discretion will be found for a denial of a mistrial only when 'no reasonable judge would have reached the same conclusion.'" *Id.* There must be a substantial likelihood the error affected the jury's verdict. *Id.* Stated another way, "[a] mistrial should be ordered " 'only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. *Id.*

Whether a mistrial was warranted is determined by analyzing 1) the seriousness of the irregularity, 2) whether it involved cumulative evidence, and 3) whether the trial court properly instructed to disregard the irregularity or error. *Id.*

These three factors, the *Hopson* Factors[1], ask whether the irregularity was serious enough to materially affect the outcome of the trial. *Id.* at 777. With respect to this point, the integrity of Mr. Smith was

[1] *State v. Hopson*, 113 Wn.2d 273, 778 P.2d 1014 (1989).

a nominal issue in the trial. Far more problematic for Mr. Guenther were the multitude of mistruths, half-truths and absurd statements attributed to him. For example, initially Mr. Guenther was not able to identify the owner of the property in question and appeared very nervous. He then told Deputy Tamura a friend, whose name Mr. Guenther was not able to provide, said it was okay to fell the tree in question. To Sgt. Apeland Mr. Guenther said the land in question belonged to a man in California but he did not have a name or contact number for this individual. Mr. Guenther next advised that he was just there to help Mr. Smith. Shortly after that Mr. Guenther once again changed his story and told Sgt. Apeland that he didn't specifically have permission to be there, but some other guy named John did. Mr. Guenther couldn't provide any information about John. Finally, Mr. Guenther acknowledged he did not have permission to be present on the land in question and that he was going to try to cut some of the wood and sell it to Faith Farm which is a mill that cuts maple blocks down into billets for sale for musical instruments, the cuts in the maple tree being consistent with this information. In reality, Mr. Smith added very little to the narrative that was not already addressed in Mr. Guenther's confession to Sgt. Apeland.

Hopson then asks whether the trial irregularity involved cumulative evidence. *Id.* at 781. "If the evidence was cumulative, a

mistrial may not be necessary." *Id.* While not directly on point but relevant to the analysis: As outlined in the preceding paragraph, there was significant cumulative evidence that called Mr. Guenther's integrity into question such that questions about Mr. Smith's reputation were really of no consequence.

Finally, *Hopson* Factor Three asks "whether the trial court properly instructed the jury to disregard the irregularity." *Id.* It did. And just as in *Garcia* (*Id.* at 782), the Trial Court cured the irregularity almost immediately.

Based on the information available to it, the Trial Court properly declined the defense invitation for a mistrial. Defendant fails to show the Trial Court abused its discretion by denying the motion for mistrial.

C. Defense counsel's failure to object to a *de minimis* misstatement of facts during the State's closing argument does not constitute ineffective assistance of counsel.

To establish ineffective assistance of counsel, Mr. Guenther must establish his trial attorney's performance was deficient and the deficiency prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). Mr. Guenther suggests that the failure to object to the State's use of the word "guitar" during the State's closing argument constituted ineffective assistance of counsel. "Only in egregious

circumstances will the failure to object constitute incompetence of counsel justifying reversal. If the failure to object could have been a legitimate trial strategy, it cannot serve as a basis for a claim of ineffective assistance." *State v. Smiley*, 195 Wn. App. 185, 195, 379 P.3d 149 (2016) [internal citations omitted].

As mentioned previously, the extent to which this was an error is *de minimis* at best. Calling wooden musical instruments "guitars" was hardly a cringe worthy moment in the trial. This error by the State is the functional equivalent of a typographical error. An objection could have been raised but defense counsel would quite possibly come across as petulant or childish. Maintaining credibility in front of the jury is one of the most important things trial counsel can do. Raising silly or frivolous objections and wasting the jurors' time does nothing to enhance one's reputation. Counsel's decision to not object was no doubt a strategic decision. Even if it were unintentional and defense counsel simply missed the issue, such a minor error would have not had any impact on the trial as other evidence existed, as pointed out earlier in this brief, that the wood could be used to create some form of a wooden musical instrument. As such, there was no prejudice to Mr. Guenther.

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D. The Trial Court properly imposed legal financial obligations.

The Trial Court imposed $800.00 in mandatory legal financial obligations (DNA fee, Crime Victim's Monies and the Filing Fee) and $600.00 in discretionary legal financial obligations related to the cost of court appointed counsel.

In *State v. Stoddard*, 192 Wn. App. 222, 225, 366 P.3d 474 (2016), Div. III of this Court affirmed the trial court's imposition of "a $500 victim assessment fee, a $200 criminal filing fee, and a $100 DNA collection fee." And stated: "RCW 7.68.035, RCW 36.18.020(2)(h), and RCW 43.43.7541 respectively mandate the fees regardless of the defendant's ability to pay. Trial courts must impose such fees regardless of a defendant's indigency." *Id.*

The State believes the Trial Court's colloquy with Mr. Guenther satisfies the requirements of *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). The Trial Court told Mr. Guenther the LFOs would be $1,400.00. It asked Mr. Guenther if he was able to work and if he would be able to pay the LFOs off over the next three to four years. Mr. Guenther indicated he could. The minimum amount he would need to pay to take care of the principal was a little over $29.00/month over the course of four years. Mr. Guenther said he could pay $50.00/month. The Trial Court asked if he was sure and Mr. Guenther responded affirmatively.

The Trial Court satisfied the requirement of *Blazina.*

That said, as a general principle, this Prosecutor's Office is opposed to any efforts to balance the costs of the criminal justice system on the backs of the poor. Had your undersigned been present at the trial, it is doubtful the State would have requested payment of non-discretionary LFOs.

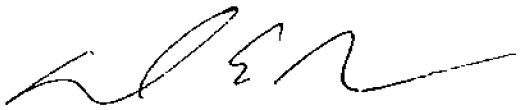
E. The State Lacks Sufficient Information to Determine Whether this Court should impose appellate costs due to Defendant's alleged indigency.

The State is not in possession of any financial records for Mr. Guenther and cannot adequately address Mr. Guenther's ability to pay the appellate costs herein.

IV. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

Respectfully submitted this 13th day of January, 2017.



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PROOF OF SERVICE

I, Sarah Martin, declare that on this date:

I filed the State's BRIEF OF RESPONDENT electronically with the Court of Appeals, Division II, through the Court's online filing system. I delivered an electronic version of the brief, using the Court's filing portal, to:

Jennifer V. Freeman, WSBA #35612
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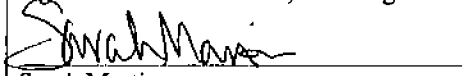
I declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct. Dated this 13th day of January, 2017, and signed at Port Townsend, Washington.



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